IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* *

NO. 77-976

* *

BILLY W. DAVIS,

Petitioner

v.

THE UNITED STATES
OF AMERICA,

Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* *

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * * * * * * *

The Petitioner, Billy W. Davis, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 9, 1977.

OPINIONS BELOW

The decision for the United States District Court for the Western District of Texas dated July 30, 1976 is reprinted in the appendix "A" hereto. The opinion for the Court of Appeals for the Fifth Circuit dated December 9, 1977 is reprinted in appendix "B" hereto.

JURISDICTION

The indictment in this case was returned against the Petitioner Billy W. Davis and Anthony J. Salinas. It purportedly alleged violations of 18 U.S.C. 1962(c) and 18 U.S.C. 2. The District Court found that count one failed to allege a Federal offense and on July 30, 1976 dismissed the first count of the indictment as to both Defendants.

The judgment of the Court of Appeals reversing the District Court's decision was entered on December 9, 1977. This petition for certiroari is filed within thirty (30)

days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether State penal laws which simply prohibit acts of gambling ipso facto proscribe the business of gambling.

2. Whether 18 U.S.C. 1961(6) defining an unlawful debt as one incurred in violation of State laws against gambling and the business of gambling applies in a State that forbids gambling but has no specific statutory proscription of the business of gambling.

3. Whether in keeping with the congressional intent that only large scale gambling operations be reached under the Organized Crime Act of 1970, State law is incorporated rather than simply definitional of federal crimes.

STATUTORY PROVISIONS INVOLVED

Section 1961(6) of Title 18 U.S.C.:

> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of

> the United States, a State or policitical subdivision thereof, or which is enforceable under State or Federal law in whole or part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Title 18, United States Code, Section 1962(c):

1962. Prohibited activities

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, United States Code, Section 1961:

1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat invovling murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: Section 201 (relating to bribery), Section 224 (relating to sports bribery), Sections 471, 472, and 473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment) if the act indictable under Section 659 is feloneous, Section 664 (relating to embezzlement from pension and welfare funds), Sections 891-894 (relating to extortionate credit transactions), Section 1084 (relating to the transmission of gambling information), Section 1341 (relating to mail fraud, Section 1343 (relating to wire fraud), Section 1503 (relating to obstruction of justice), Section 1510 (relating to obstruction of criminal investigations), Section 1511 (relating to the obstruction of State or local law enforcement), Section 1951 (relating to interference with commerce, robbery, or extortion), Section 1952 (relating to racketeering), Section 1953 (relating to interstate

transportation of wagering paraphernalia), Section 1954 (relating to unlawful welfare fund payments), Section 1955 (relating to the prohibition of illegal gambling businesses), Sections 2314 and 2315 (relating to interstate transportation of stolen property), Sections 2421-23 (relating to white slave traffic), (C) any act which is indictable under Title 29, United States Code, Section 186 (dealing with restrictions on payments and loans to labor organizations) or Section 501(c) (relating to embezzlement from union funds), or (D) any offense invovling bankrupty fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

Former Texas Penal Code:

Article 652(a). Bookmaking; definition; penalty

Accepting or placing wages; punishment

Section 1. Any person who takes or accepts or places for another a bet or wager of money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any

person who offers to take or accept or place for another any such bet or wager, or any person who is an agent, servant or employee or otherwise, aids or encourages another to take or accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars.

Section 2. Any persons who shall within a period of one (1) year next preceeding the filing of the indictment commit as many as three (3) acts which are prohibited under Section 1 of this Act shall be guilty of engaging in the business of book making and upon conviction shall be punished as provided in Section 1 of this Act.

1974 Texas Penal Code:

Preliminary Enacting Legislation, Acts 1973, 63rd Leg., p. 883, ch. 339, sect. 6; V.T.C.S. Penal Code, 1 Penal p. 3

Section 6. Saving provisions. (a) Except as provided in Subsections (b) and (c) of this section, this Act

applies only to offenses commited on or after its effective date, and a criminal action for an offense committed before this Act's effective date is governed by the law existing before the effective date, which law is continued in effect for this purpose, as if this Act were not in force . . .

(b) Conduct constituting an offense under existing law that is repealed by this Act and does not constitute an offense under this Act may not be prosecuted after the effective date of this Act. If, on the effective date of this Act, a criminal action is pending for conduct that was an offense under the laws repealed by this Act and that does not constitute an offense under this Act, the action is dismissed on the effective date of this Act . . .

1974 Texas Penal Code

Section 47.01 Definitions

In this chapter:

(1) "Bet" means an agreement that, dependent on chance or even though accompanied by some skill, one stands to win or lose something of value. A bet does not include:

(A) contracts of indemnity of guaranty, or life, health, property, or accident insurance; or

(B) an offer of a prize, award, or compensation to the actual

contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest.

(2) "Gambling place" means any real estate, building, room, tent, vehicle, boat or other property whatsoever, one of the uses of which is the making or settling of bets, the receiving, holding, recording, or forwarding of bets or offers to bet, or the conducting of a lottery or the playing of gambling devices.

(3) "Gambling device" means any mechanical contrivance that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance.

(4) "Altered gambling equipment" means any contrivance that has been altered in some manner, including, but not limited to, shaved dice, loaded dice, magnetic dice, mirror rings, electronic sensors, shaved cards, marked cards, and any other equipment altered and designed to enhance the actor's chance of winning.

(5) "Gambling paraphernalia" means any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games.

(6) "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

(7) "Private place" means a place to which the public does not have access, and excludes, among other places, streets, highways, restuarants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.

(8) "Thing of value" means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

1974 Texas Penal Code

Section 47.02. Gambling

(a) A person commits an offense if he:
(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;
(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or
(3) plays and bets for money on other thing of value at any game played with cards, dice, or balls.

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;
(2) no person received any economic benefit other than personal winnings; and
(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class C misdemeanor.

1974 Texas Penal Code

Section 47.03. Gambling Promotion

(a) A person commits an offense if he intentionally or knowingly does any of the following acts:
(1) operates or participates in the earnings of a gambling place;
(2) receives, records, or forwards a bet or offer to bet;
(3) for gain, becomes a custodian of anything of value bet or offered to be bet;
(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or
(5) for gain, sets up or promotes any lottery or sells or

offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check or other device designed to serve as evidence of participation in any lottery.
(b) An offense under this section is a felony of the third degree.

STATEMENT OF THE CASE

The indictment was returned February 12, 1976. It alleges that Defendant Salinas was a customer of Main Bank and Trust, a banking corporation, from September, 1971 through November 18, 1975. Until February, 1975 Petitioner Davis was vice president of Main Bank and Trust and assigned to the installment loan department; in that capacity Davis loaned money to Salinas and various members of the general public. The indictment further alleges that Salinas was engaged in the business of gambling in violation of the law of the State of Texas. The gambling offenses occuring before January 1, 1974 were prohibited by Article 652a, Texas Criminal Statutes; gambling offenses occuring after January 1, 1974 were prohibited by Section

47.03 of the 1974 Texas Penal Code. Davis was alleged to have been aware of Salinas' gambling activity, and Davis serviced Salinas' banking needs both as a depositor and a borrower.

Beginning on or about September 16, 1971 Salinas began to bring other individuals who as gambling bettors had lost money to Salinas to Main Bank and to Davis. These persons would take out loans on which Salinas would pledge collateral and/or cosign. These other individuals were not asked to nor did they fill out loan applications. They were not asked the purpose of the loans--which was to pay off gambling debts owed to Salinas and/or others. The loans were sometimes repaid in regular installments and sometimes repaid by Salinas to offset later gambling lossess to these same individuals.

On various dates between 1971 and 1974 Salinas and Raymond L. Mozisek, Jesse Y. Moreno, Carlos G. Zuniga, Jack L. Minica William J.

Cummings, Ronald W. Clark and Louis D. Pedrotti borrowed money from Main Bank and Trust through its vice president, Petitioner Davis, for the purpose of paying these gambling debts which they had incurred as between themselves. The collateral pledged on these loans maintained by Salinas at the bank at all times included stock certificates, cash value life insurance, and certificates of deposit.

The indictment embraced acts of gambling for a period during which they were denounced in part by the 1925 Penal Code (Article 652a) and the 1974 Code (Section 47.03).

The District Court found (1) that 18 U.S.C. 1961(6) adopts and incorporates State law in a manner analogous to the incorporation of the State law into Federal law under the Assimilative Crime Acts (18 U.S.C. 13); (2) the 1974 Texas Penal Code does not prohibit the business of gambling; (3) since the savings provisions of the 1974 Texas Penal Code vitiate and abate

pending prosecutions for acts no longer denounced under the new Code the indictment failed to allege a Federal offense under 18 U.S.C. 1962(c).

Noting that the question was one of first impression the Court of Appeals held the indictment alleged a Federal violation under 18 U.S.C. 1962(c) for the collection of illegal gambling debts holding that State penal laws which simply prohibit acts of gambling ipso facto proscribe the business of gambling.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BY THE COURT OF APPEALS THAT THE TEXAS PENAL CODE WAS NCT INCORPORATED BUT SIMPLY DEFINITIONAL OF A FEDERAL CRIME DEFINING "UNLAWFUL DEBT" IS NOT IN KEEPING WITH THE CONGRESSIONAL INTENT TO EXCLUDE THE ACT FROM LOCAL, TRANSITORY GAMBLING ACTIVITIES, LEAVING THE REGULATION TO STATE AND LOCAL AUTHORITIES.

The Fifth Circuit Court of Appeals has previously discussed the congressional intent behind the Organized Crime Control Act of 1970.

> Congress excluded local, transitory gambling activities from the scope of the law, leaving their regulation to State and local authorities, but it asserted Federal jurisdiction over racketeering and large-scale gambling activities.

In 1976 the Court of Appeals enlarged upon the congressional intent to exclude the operation of the act to small time gambling activities. U.S. v. Box, (5 Cir. 1976) 530 F. 2d 1258, 1264, 1265.

> Clearly, the dominant concern motivating Congress to enact Section 1955 was that large-scale gambling operations in this country have been closely intertwined with large-scale organized crime, and indeed may have provided the bulk of the capital needed to finance the operations of organized crime. The target of the statute was large-scale gambling operations-local "mom and pop" book making operations were to be left to State law. In this connection, the requirements of dollar volume ($2,000.00 gross on any day) or duration (30 days or more) and number of participants (5) were drafted into the legislation. These requirements are such that relative small-crime can conceivably be ensnared in

> the statutory strictures, but apparently Congress was of the opinion that the size of gambling operations was often much larger than could be proved, and that law enforcement officials needed some flexibility in order effectively to combat the large-scale operations.

An examination of Box indicates that the Defendant was engaged in rather extensive gambling activity in violation of the laws of the State of Louisiana. However, the evidence failed to show that his gambling activities were of a sufficient nature to constitute an illegal gambaling business, and consequently the prosecution was reversed and the indictment subsequently dismissed. This decision is significant because the definition of "unlawful debt" in 18 U.S.C.A. 1961(c) also includes an unlawful debt as a debt (a) incurred or contracted in gambling activity which was in violation of the law of the United States..., and (b) which was incurred in connection with the business of gambling in violation of the law of the United States.

Had the instant indictment alleged the unlawful debts to have been so incurred it would have been incumbent upon the government to not only allege that the debts were incurred in gambling activity in violation of the laws of the United States but to allege and prove, the second conjunctive requirement, that the business of gambling meet the Federal statutory criteria set out in Section 1955. Anything less would not suffice.

The novel application and construction by the Court in this case would simply mean that unlawful debts under 18 U.S.C. 1961(6) require only a generic violation of the laws of the United States despite the clear language of the Act to the contrary. Extending the decision by the Court of Appeals to its logical conclusion it is enough for the government to show that the unlawful debts were incurred in connection with the business of gambling in violation of Federal law as that term is generally understood

and thereby circumvent and ignore the federal statutory standards of an illegal gambling business.

The Court of Appeals' decision is strained by its interpretation extending the application of generic definitions of "racketeering activity" to "unlawful debt". The Court relies heavily on United States v. Nardello, 1969, 393 U.S. 286, 90 Sup. Ct. 534, 21 L. Ed. 2d 487, where the Court held that a Defendant could be convicted under the Travel Act if his conduct included "acts prohibited by State law" which would be generically classified as extortionate i.d. at 290, 90 S. Ct. 536. The Court furthur relied upon decisions by the Court and other circuits in United States v. Brown, 5 Cir. 1977, 555 F. 2d 407, 418n.22; United States v. Conway, 5 Cir. 1977, 507 F. 2d 1047; United States v. Cerone, 7 Cir. 1971, 452 F. 2d 274, 287 cert. denied, 1972, 405 U.S. 964, 92 S. Ct. 1168, 31 L. Ed 2d 240; United States v. Rizzo,

7 Cir. 1969, 419 F. 2d 71, 80 cert. denied, 1970, 397 U.S. 967, 90 S. Ct. 1006, 25 L. Ed. 2d 260; United States v. Kariajinnis, 7 Cir. 1970, 430 F. 2d 148, 150, cert. denied, 1970, sub. nom.; Panagitopoulos v. United States, 400 U.S. 904, 91 S. Ct. 143, 27 L. Ed. 2d 141; United States v. Frumento, 3rd Cir. 1977, 559 Fed. 2d 1209; United States v. Forsythe, 3rd Cir. 1977, 560 F. 2d 1127.

Reliance on all of these cases is misplaced because although admittedly arising under the RICO statutes (The Racketeering Influence and Corrupt Organizations Act), Title 9 of the Organized Crime Control Act of 1970, Chap. 96 of Title 18 U.S.C. 1961-1968, they center upon acts which constitute patterns of racketeering rather than unlawful debt.

18 U.S.C. 1961(1) provides that "racketeering activity" means (a) any act or threat involving murder, kidnapping, gambling..., which is chargeable under State law and punishable by

imprisonment for more than one (1) year; (b) any act which is indictable under any of the following provisions of Title 18, U.S.C.:. . . (c) any act which is indictable under Title 29, U.S.C. Section 186 . . . or (d) any offense involving bankruptcy fraud . . .

Each one of these cases taken in its own context is correct because the act by its very terms makes but a generic reference to the various acts which constitute racketeering activities. As noted above a generic construction to include the business of gambling overextends the act beyond its stated congressional limits.

II.

THE DECISION BY THE COURT OF APPEALS CONFLICTS WITH ITS PREVIOUS HOLDINGS AND THOSE OF OTHER CIRCUITS.

The decision by the Court of Appeals conflicts with its own holdings and interpretations of State law found in 18 U.S.C. 1952 (the Travel Act) which this Court and the Court of Appeals have held "merely serves a definitional purpose".

In United States v. Prince, (5th Cir. 1975) 515 F. 2d 564, 566 the Court stated:

> This Court has recently held, however, that in Section 1952 cases State law "merely serves a definitional purpose", United States v. Conwy, 5th Cir. 1975, 507 F. 2d 1047, 1051. There is no need to prove a violation of the State law as an essential element of the Federal crime and therefore the failure to define a generic term according to State law is not error, i.d. In Conway we look to United States v. Nardello, 1969, 393 U.S. 286, 89 S. Ct. 534, 21 L. Ed 2d 487, where the Supreme Court held that prosecution under Section 1952 was not restricted to State labels, but that it is sufficient for the act to fall within the "generic term" charged.

A definitional reference to State law requires no proof of its violation. However, a different rule applies under the illegal business of gambling prohibited by 18 U.S.C. 1955, part of the Organized Crime Control Act of 1970. The following cases illustrate this point.

In United States v. Hawes, (5th Cir.) 1976, 529 F. 2d 472, 477, 478 the Court in affirming an illegal gambling business operation under

Section 1955 reemphasized the incorporation of State laws.

> The Constitution is not violated when a Federal statute incorporates the laws of the State. See United States v. Sharpnack, 355 U.S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282 (1958) (assimilative crimes, 18 U.S.C.A. Section 13); Kentucky Whip and Collar Co. v. Illinois C. R. Co., 299 U.S. 334, 57 S. Ct. 277, 81 L. Ed. 270 (1937) (convict-made goods); Clark Distilling Co. v. Western Maryland Ry. Co., supra, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (liquor transportation), 27 U.S.C.A. Sect. 122.

In United States v. Crockett, (5th Cir. 1975) 506 F. 2d 759, 761 the Court stated:

> Thus, in order to violate Federal law one must first be guilty of violating State or local law.

In United States v. Smaldone, (10th Cir. 1973) 485 F. 2d 1333, 1345 the Court held that State gambling statutes are incorporated rather than merely serving a definitional purpose.

> It is well settled in the law that Congress may adopt as Federal laws the laws of the

> the State, and such is not an unconstitutional delegation of congressional authority. United States v. Sharpnack, 355 U.S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282.

In United States v. Berent, (9th Cir. 1975) 523 F. 2d 1360 the Court upheld the dismissal of an indictment which charged the operation of an illegal gambling business alledgedly violative of the Nevada law since "sports pool" did not include sports book making.

III.

THE NOVEL INTERPRETATION BY THE COURT OF APPEALS THAT STATE ACTS PROHIBITING VARIOUS ACTS OF GAMBLING IPSO FACTO PROHIBIT THE BUSINESS OF GAMBLING DEPRIVES THE PETITIONER DAVIS OF HIS FIFTH AMENDMENT RIGHTS TO DUE PROCESS.

In this case of first impression the Court of Appeals has held that in States where acts of gambling are illegal the business of gambling is ipso facto illegal although the latter may not be prohibited by statute. Such a holding presents a novel, nursling theory never urged by the government at any stage of these proceedings.

For certain the Petitioner Davis could hardly anticipate that his conduct would violate the act as so interpreted since the decision by the Court of Appeals is as much a surprise to the government as the Petitioner.

The Texas law does not take such a jaundiced attitude towards loans made to third persons for the purpose of either paying or collecting gambling debts. Quite to the contrary the Texas Courts have long recognized in an unbroken line of decisions that loans evidenced by promissory notes made to a loser to pay his gambling lossess are collectible even though the lender knew the purpose of the loan. Stated otherwise, the lender is a holder in due course, although the original debt had its inception in illegal gambling transactions. Oliphant v. Markham, 79 Tex. 543, 15 S.W. 569 (Tex. S. Ct.); Perkins v. Nevell, Tex. Comm. App., 58 S.W. 2d 50; Frost National Bank v. Mitchell, Tex. Civ. App., 362 S.W. 2d 198 (1962); Nelson v. Powell,

Tex. Civ. App., 434 S.W. 2d 165 (1968).

At best the Petitioner Davis is guilty of a constructive criminal offense arrived at by strained logic. Certainly in the act in question there is no clear and positive expression by legislative fiat or definition that by engaging in one act of gambling one necessarily becomes a wholesale gambler. Under these circumstances any banker could act on one conception of the statute and the Court on another. The act as so construed is not sufficiently explicit nor does it inform the Petitioner Davis nor any person of ordinary intelligence notice that his contemplated conduct is forbidden by the statute since no man should be held criminally responsible for conduct which he cannot reasonably understand to be proscribed. United States v. Universal C.I.T. Credit Corporation, D.C. mo., 102 F. Supp. 179, affirmed, 73 S. Ct. 227, 344 U.S. 218, 97 L. Ed. 260; Winters v. People of State of New York, 68 S. Ct. 665, 333

U.S. 507, 92 L. Ed 840; Troutman v. United States, 59 S. Ct. 590, 306 U.S. 649, 83 L. Ed. 1047; Jordan v. DeGeorge, 72 S. Ct. 703, 341 U.S. 223, 95 L. Ed. 886, rehearing denied, 72 S. Ct. 1011, 341 U.S. 956, 95 L. Ed. 1377.

Despite the numerous cases arising under this act in the various circuits, this Court has yet to entertain a petition for certiorari involving the construction of the various provisions of the Crime Control Act of 1970. This case represents the farthest outreach by any Court in the construction of the Statute and takes us dangerously close to the Third Reich's "National Conscience" Act of June 28, 1935.

The act had striking similarities to the generic definitions found in the Crime Control Act of 1970. (Acts involving murder, rape . . . chargeable under State law or acts indictable under Federal Law.)

The act provided:

> Whoever commits an action which the law declared to be punishable,

> or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people shall be punished.

The effect of the legislation was accurately summed up by Lawrence Preuss writing in 26 Journal of American Institute of Criminal Law and Criminology, 847.

> . . . The right of the Courts to punish without a written law destroys the last defense of the individual against the totalitarian national socialist state.

CONCLUSION

For these various reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

In accordance with the rules of the Court, true and correct copies of the foregoing Petition for Certiorari have been served upon the following counsel by personal delivery to their law offices:

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To further certify that copies of the Petition for Certiorari have been served upon the following counsel by placing same in the United States mail with first class, air mail, postage prepaid on this ___ day of January, 1978:

Hon. Wade McCree
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MAYO J. GALINDO

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	
	)	SA-76-CR-25
ANTHONY J. SALINAS AND	)	
BILLY W. DAVIS	)	

ORDER DISMISSING COUNT ONE OF THE INDICTMENT

Defendants' Motions to Dismiss Count One of the Indictment questions whether an indictment brought alleging a federal crime under 18 U.S.C. 1962(c), which incorporates State criminal statutes is valid when a State indictment could no longer be brought under the law. The Court finds that Count One of the indictment does not allege a federal offense and therefore orders dismissal of that Count.

Count One of the Indictment alleges that the Defendants from the fall of 1971 to about the end of 1975 engaged in the collection of

unlawful debts by being associated with an enterprise engaged in interstate commerce in violation of 18 U.S.C. 1962(c). 18 U.S.C. 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in... interstate...commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through... collection of unlawful debts.

18 U.S.C. 1961(6) defines "unlawful debt" as follows:

> "'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of..., a State or political subdivision thereof...and (B) which was incurred in connection with the business of gambling in violation of the law of..., a State or political subdivision thereof...1/

Under the allegations of this Indictment, the conduct alleged in Count One of the Indictment, to constitute a violation of 18 U.S.C. 1962(c) must necessarily constitute a violation of

---

1/ There is no allegation that the "business of gambling" in the Indictment refers to federal law 18 U.S.C. 1955.

Texas law. Section 1961(6) takes its meaning both as to "gambling" and "business of gambling" by adopting and incorporating the Texas law of "business of bookmaking". When 18 U.S.C. 1961(6) adopts and incorporates State law it does so in a manner analogous to the incorporation of State law into federal law under the Assimilative Crimes Act (18 U.S.C. 13; c.f. United States v. Hawes, 529 F. 2d 472, 478 (5th Cir. 1976)). This means that Section 1961(6) necessarily becomes subject to every subsequent change in State law, including its repeal. c.f. United States v. Sharpnack, 355 U.S. 286 (1958).

During the course of conduct alleged in the Indictment, the Texas law of "business of bookmaking" (Tex. Pen. Code Art. 652a, section 2, repealed Acts, 63rd Leg., p. 883, ch. 399) was repealed. Where an article in the 1925 Penal Code is repealed, the savings provisions of Section 6 of the 1974 Texas Penal Code

prohibited prosecution of certain offenses under the old Code after January 1, 1974. 2/

An additional reason for dismissal is that State prosecution would also be barred by the terms of Art. 652a, section 2, (repealed) even if it had not been repealed. Article 652a, section 2, provided as follows:

2/ "'Sec. 6 Saving provisions. (a) Except as provided in Subsections (b) and (c) of this section, this act applies only to offenses committed on or after its effective date, and a criminal action for an offense committed before this Act's effective date is governed by law existing before the effective date, which law is continued in effect for this purpose, as if this Act were not in force. . . .

"'(b) Conduct constituting an offense under existing law that is repealed by this Act and that does not constitute an offense under the Act may not be prosecuted after the effective date of this Act. If, on the effective date of the Act, a criminal action is pending for conduct that was an offense under the laws repealed by this Act and that does not constitute an offense under this Act, the action is dismissed on the effective date of this Act. . . ." (Acts, 63rd Leg., p. 883, ch. 399).

> "Any person who shall within a period of one (1) year next preceeding the filing of the indictment commit as many as three (3) acts which are prohibited under Section 1 of this Act shall be guilty of engaging in the business of book making and upon conviction shall be punished as provided in Section 1 of this Act."

The indictment in this case was brought more than one year after the Act alleged in paragraph 5a of Count One. Although United States v. Revel, 493 F. 2d 1 (5 Cir. 1974) held that a federal prosecution was not barred where facts constituting a violation of State law was an element in the federal crime even though the federal indictment was brought after the State statute of limitations had run on the prosecution of the State offense, the Court finds that Revel (supra.) is not controlling, because the one year limitation in Article 652a, section 2 (repealed), is an essential element of the State offense and not merely a limitation on State prosecution. The Court therefore dis-

misses Count One of the Indictment for this ground also.

SO ORDERED this 30th day of July, 1976.

/S/ D. W. SUTTLE
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Anthony J. SALINAS and Billy W. Davis, Defendants-Appellees.

NO. 76-3398.

United States Court of Appeals,
Fifth Circuit.

Dec. 9, 1977.

A count charging defendants with collecting unlawful debts for an enterprise engaged in interstate commerce in violation of a federal antiracketeering statute was dismissed by the United States District Judge for the Western District of Texas at San Antonio, Dorwin W. Suttle J., and the Government appealed. The Court of Appeals, Wisdom, Circuit Judge, held that in a state where gambling is illegal, the business of gambling is also illegal, and thus no specific statutory ban of the business of gambling is necessary for prosecution under the statute.

Reversed and remanded.

1. Commerce - 82.10

Inquiry in prosecution for collecting unlawful debts for enterprise engaged in interstate commerce in violation of federal antiracketeering statute was not manner in which states classify their criminal prohibitions but whether particular state involved prohibited the activity charged. 18 U.S.C.A. 1952, 1961(6), 1962(c); V.T.C.A., Penal Code 47.03; Vernon's Ann. Tex. P.C. art. 652a.

2. Commerce - 82.10

Where no provision parallel to former state statute had been carried forward into new Penal Code, no federal prosecution under federal antiracketeering statute could be based on repealed statute. Vernon's Ann. Tex. P.C. art. 652a, sect. 2; 18 U.S.C.A. 1962(c).

3. Gambling - 62

In state where gambling is illegal, business of gambling is also illegal, and therefore no specific statutory ban of business of gambling

is necessary for prosecution under federal antiracketeering statute. 18 U.S.C.A 1952, 1955, 1955(a,b), (b)(1), 1961, 1961 note, 1961(6), 1962, 1962(c); V.T.C.A., Penal Code 47.03; Vernon's Ann. Tex. P.C. Art. 652a.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

WISDOM, Circuit Judge;

This appeal presents an issue of statutory construction: whether 18 U.S.C. 1961(6), defining an unlawful debt as one incurred in violation of state laws against gambling and the business of gambling, applies in a state that forbids gambling but has no specific statutory proscription of the business of gambling. We believe that 1961(6) applies, and reverse the district court's judgment.

This case arises out of an appeal by the

government from dismissal of one count of an indictment. The dismissed count charged Anthony J. Salinas and Billy W. Davis, defendants/appellees, with collecting unlawful debts for an enterprise engaged in interstate commerce in violation of 18 U.S.C. 1962(c).[1] For the purpose of 1962(c), "'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of... a State..., and (B) which was incurred in connection with the business of gambling in violation of the law of...State..." 18 U.S.C.

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1. 18 U.S.C. 1962 (c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interestate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts

1961(6).[2] On appeal, Salinas and Davis contend that they may be prosecuted under 1962(c) only if their activities violated state laws specifically prohibiting both gambling and the business of gambling. We hold that in a state where gambling is illegal, the business of gambling is also illegal; therefore no specific statutory ban of the business of gambling is necessary for the prosecution under the statute.

I.

The dismissed count of indictment alleges

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2. 18 U.S.C. 1961(6) provides in full:

> (6) "unlawful debt" means a debt (a) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision threof, or the business of lending money or a thing of value at a rate usurious under State or Federal Law, where the usurious rate is at least twice the enforceable rate.

that from 1971 to 1974 Salinas was engaged in the business of gambling. Davis was a vice-president of the Main Bank and Trust of San Antonio, Texas, and was assigned to its Installment Loan Department. Davis allegedly knew that Salinas was in the business of gambling. The indictment charges that Salinas brought people who owed him gambling debts to Davis to apply for loans. Davis allegedly granted the loans without asking the recipients ther purpose in seeking the loan and without requiring them to fill out loan applications. Salinas cosigned or pledged collateral for these loans. The government alleges that proceeds of the loans went to pay gambling debts to Salinas. The loans were later repaid.

Texas Penal Code 47.03 proscribes gambling.[3]

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3. Texas Penal Code 47.03 provides:

Gambling Promotion
(a) A person commits an offense if he

That statute became effective January 1, 1974. Before that date the only reference to the business of gambling was a prohibition of "the business of bookmaking",[4] which, of course,

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intentionally or knowingly does any of the following acts:
(1) operates or participates in the earnings of a gambling place;
(2) receives, records or forwards a bet or offer to bet;
(3) for gain, becomes a custodian of anything of value bet or offered to be bet;
(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest, or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee or candidate; or
(5) for gain, sets up or promotes any lottery or sells or offers to sellor knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.
(b) An offense under this section is a felony of the third degree.

4. Former Texas Penal Code Art. 652a provided:

Art. 652a. Bookmaking; definition, penalty
Accepting or placing wagers; punishment
Section 1. Any person who takes or accepts or places for another a bet or wager of

is narrower in scope than the business of gambling. Tex. Penal Code, Art. 652a (repealed January 1, 1974). Since 1974 there has been no specific use of the term "business" in any of the anti-gambling laws of Texas.

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money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any person who offers to take or accept or place for another any such bet or wager; or any person who as an agent, servant or employee or otherwise, aides or encourages another to take or accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars.

Section 2. Any person who shall within a period of one (1) year next preceding the filing of the indictment commit as many as three (3) acts which are prohibited under Section 1 of this Act shall be guilty of engaging in the business of book making and upon conviction shall be punished as provided in Section 1 of this Act.

II.

The question whether a prosecution under Section 1962(c) for the collection of illegal gambling debts may be maintained in a state that forbids gambling but that does not specifically bar the business of gambling is apparently one of first impression. Congress did not define the term "business of gambling" in Section 1961(6). It did, however, provide that content should be given to the term by resort to state law.

Other federal anti-racketeering statutes make reference to state law. Courts construing the racketeering statutes have found that the references to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute.

In United States v. Nardello, 1969, 393 U.S. 286, 89 S. Ct. 534, 21 L. Ed. 2d 487, the Supreme Court construed the Travel Act, 18 U.S.C.

1952.[5] Section 1952 bars travel with the intent to carry out "extortion ... in violation of the laws of the State in which committed or

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5. 18 U.S.C. 1952 provides:

> Interstate and foreign travel or transportation in aid of racketeering enterprises
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs or attempts to perform any of the acts specified in the subparagraphs (1), (2), and (3), shall be fined not more than $1,000.00 years or imprisoned for not more than five years, or both.
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which commited or of the United States.

of the United States". The defendants in Nardello allegedly lured their victims into compromising homosexual situations and threatened them with exposure if they did not pay the defendants. Pennsylvania law characterized such activity as "blackmail" rather than "extortion". Nevertheless, the Supreme Court allowed the prosecution to proceed. The Court found that "the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged". 393 U.S. at 295, 89 S. Ct. at 539. The Court found that there was great variance among the states in the terms used to describe and to forbid extortion, and found that Congress could not have intended to apply the Travel Act if his conduct included "acts prohibited by State law which would be generally classified as

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> (c) Investigations of violations under this section involving liquor of narcotics shall be conducted under the supervision of the Secretary of the Treasury.

extortionate". Id. at 290, 89 S. Ct. at 536. Thus, the nomenclature in the state statute need not match that of Section 1952 precisely.

(1) Although Nardello construed a different statute, its logic is persuasive here. We must look not to "the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the... activity charged". 393 U.S. at 295, 89 S. Ct. at 539.

(2) States making gambling illegal differentiate among levels of gambling activity. First, a state may enact a statute forbidding gambling and may enact a supplementary statute, perhaps with more severe penalties, against extensive gambling activity or against "commercial gambling". Second, a state may have a single statute, and may seek to proceed against extensive violations of the same offense. The latter situation prevails in Texas, where no current statute expressly forbids the

business of gambling.[6] The particular means a State chooses to deal with the problem of commercial gambling, like the choice between the words "extortion" and "bribery" in Nardello, should not control the applicable federal anti-gambling law.

(3) The defendants do not seriously contend that the business of gambling is legal in Texas. If a single act of gambling is illegal, then gambling as a means of livelihood or as an ongoing commercial operation must be illegal as well. The defendants seek to seize

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6. The single statute situation also applies to the alleged violations that occured prior to January 1, 1974. The savings provision of the 1974 Penal Code provides that "Conduct constitution an offense under existing law that is repealed by this Act and that does not constitute an offense under this Act may not be prosecuted after the effective date of this Act." Preliminary Enacting Legislation, Acts 1973, 63d Leg., p. 883, ch. 399, Sect. 6(b); V.T.C.S. Penal Code, 1 Penal 3. No provisions parallel to the business of bookmaking statute, former Texas Penal Code Art. 652a(2), quoted in note 4, was carried forward into the new

upon the state's not classifying gambling as precisely as does the federal statute. But it was not the intent of Congress to attack gambling only in states that classify gambling along the federal model. The reason for the Congressional conjunctive requirement that a debt be incurred in connection with gambling and with the business of gambling was that it sought to punish only large scale gambling operations involving "organized crime" as contrasted with small time gambling. Pub. L. 91-452, Sect. 1, Oct. 15, 1970.[7]

This Court has extended the logic of the Nardello case to the language of other provisions of the federal anti-racketeering statutes.

Penal Code. Therefore, no federal prosecution can be based on the repealed statute. Cf. United States v. Sharpnack, 1958, 335 U.S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282.

7. Congress also provided that "The provisions of this title (18 U.S.C. 1961-1968) shall be liberally construed to effectuate its remedial purposes". Pub. L. 91-452, Sect. 904(a).

In United States v. Revel, 5 Cir. 1974, 493 F. 2d 1, we faced the question whether the federal or the state statute of limitation applies in a prosecution under 18 U.S.C. 1955.[8]

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8. Section 1955(a)-(b) provides:

Prohibition of illegal gambling businesses
(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000.00 or imprisoned not more than five years, or both.
(b) As used in this section—
(1) "illegal gambling business" means a gambling business which—
(i) is a violation of the law of a State or political subdivision in which it is conducted;
(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbered games, or selling chances therein.
(3) "State" means any State of the United States, the District of Columbia, the Commonwelath of Puerto Rico, and any territory or possession of the United States.

That section, like Sections 1961 and 1962, was enacted as part of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922. It forbids the operation of an "illegal gambling business". It defines "illegal gambling business" as one involving five or more persons, operating for over thirty days or grossing at least $2,000.00 on one day, in "violation of the law of a State or political subdivision in which it is conducted". 18 U.S.C. 1955(b)(1). We cited Nardello and held: "Just as in 18 U.S.C. 1952, the so-called Travel Act, the reference to state law in the federal statute is for the purpose of defining the conduct prohibited and for the purpose of supplementing, rather than pre-empting, state gambling laws". Id. at 2-3 (emphasis in original) (footnote omitted). We decided that we should use "federal standards in enforcing the federal law" and we held that the defendant could be convicted even though the applicable

state limitation period had expired. Id. at 3. See also United States v. Brown, 5 Cir. 1977, 555 F. 2d 407, 418 N. 22.

In United States v. Crockett, 5 Cir. 1975, 506 F. 2d 759, another Sect. 1955 prosecution, we found that the trial judge did not err in failing to give the jury the Georgia statutory language making it illegal to conduct a gambling business in the state. We found no error in the trial court's statement that "the law of the state of Georgia prohibits commercial gambling enterprises" without further explanation. Id. at 761. We found no need for recourse to the specific language of the state statute. See also United States v. Brown, 5 Cir. 1977, 555 F. 2d 407, 418 n. 22; United States v. Conway, 5 Cir. 1975, 507 F. 2d 1047; United States v. Cerone, 7 Cir. 1971, 452 F. 2d 274, 287, cert. denied 1972, 405 U.S. 964, 92 S. Ct. 1168, 31 L. Ed. 2d 240; United States v. Rizzo, 7 Cir. 1969, 418 F. 2d 71,

80, cert denied 1970, 397 U.S. 967, 90 S. Ct. 1006, 25 L. Ed. 2d 260; United States v. Karigiannis, 7 Cir. 1970, 430 F. 2d 148, 150, cert. denied 1970 sub nom. Panagitopoulos v. United States, 400 U.S. 904, 91 S. Ct. 143, 27 L. Ed. 2d 141.

United States v. Frumento, 3 Cir. 1977, ____ F. 2d ____, is similar to the instant case. There, the defendants were charged under the same statute, 18 U.S.C. 1962(c).[9] They were charged under the racketeering activity provisions of that statute. Section 1961(1) defines "racketeering activity" to include "bribery (and) extortion ... chargeable under State law and punishable by imprisonment for more than one year". The court upheld the defendants' conviction even though they had been acquitted in state court "on the very state law charges which formed the basis of their indictment under 18 U.S.C. 1961 et seq.". The Court found that "The state offense referred

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9. Quoted in note 1.

to in the federal act are definitional only". _____ F. 2d at _____. The Court said"

> The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intented to engage." United States v. Cerone, 452 F. 2d 274, 287 (7th Cir. 1971), quoting Mr. Justice Clark in United States v. Karigiannis, 430 F. 2d 148, 150 (7th Cir.), cert. denied sub nom. Panagitopoulos v. United States, 400 U.S. 904, (91 S. Ct.143, 27 L. Ed. 2d 141) (1970).

_____ F. 2d at _____.

In another case, the Third Circuit followed our holding in Revel that the federal statute of limitations, not the statute of limitations of the state statute used to indentify the activity proscribed by federal law, applies in a federal prosecution under the Organized Crime Control Act of 1970. United States v. Forsythe, 3 Cir. 1977, 560 F. 2d 1127, The Court stated:

> RICO (the Racketeer Influenced and Corrupt Organizations Act, Title IX of the Organized Crime Control Act of 1970, Chapter 96 of Title 18 U.S.C. 1961-68)

> is a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce. Certain of those racketeering, or predicate acts violate state law and RICO incorporates the elements of those state offenses for definitional purposes. State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations; it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity. To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law.

560 F. 2d at 1135. See also id. at 1136-38

These cases buttress our conclusion that the trial court erred in dismissed the debt collection count. The references to state law in Section 1961(6) are defintional only: violation of Section 1962(c) may occur in a state that has no specific ban of a "business of gambling".

REVERSED AND REMANDED.

No. 77-976

In the Supreme Court of the United States

OCTOBER TERM, 1977

BILLY W. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 564 F. 2d 688. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1977. The petition for a writ of certiorari was filed on January 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a prosecution under 18 U.S.C. 1962(c) for the collection of unlawful debts incurred in connection with the business of gambling may be maintained in a state that proscribes gambling but does not in express terms proscribe "the business of gambling."

STATEMENT

In the first count of an indictment filed in the United States District Court for the Western District of Texas on February 12, 1976, petitioner and co-defendant Anthony Salinas were charged with conducting an enterprise affecting commerce through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c).[1] Specifically, it was alleged that from 1971 to 1974 Salinas was engaged in the business of gambling and that petitioner was a loan officer in a bank in San Antonio, Texas (Pet. App. 6b). In order to collect his gambling debts, which were unlawful under Texas law (Texas Penal Code §47.03, effective January 1, 1974; Texas Penal Code, Art. 652a, repealed January 1, 1974), Salinas allegedly brought individuals who owed him gambling debts to petitioner, who would give the individuals bank loans to pay their gambling debts (Pet. App. 6b). It was further alleged that petitioner granted these loans without asking the recipients their purpose in seeking the loans and without requiring them to fill out an application form (*ibid.*).

Prior to trial, the district court dismissed this count of the indictment (Pet. App. A). On the government's appeal, the court of appeals reversed (Pet. App. B).

ARGUMENT

1. Petitioner challenges the court of appeals' determination that the indictment against him was erroneously dismissed. There is no reason for this Court to grant interlocutory review of the court of appeals' decision. The court of appeals' decision simply puts petitioner in the

[1]In the second count of the indictment, which is not in issue here, Salinas alone was charged with making a false statement in a loan application, in violation of 18 U.S.C. 1014.

same position that he would have been in had the district court denied his motion in the first instance. Such a denial would not have been subject to interlocutory appeal (see *Cobbledick* v. *United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327). Petitioner may be acquitted, in which case his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by way of a petition for a writ of certiorari seeking review of the final judgment.

2. In any event, there is no merit to petitioner's contention. The statute, 18 U.S.C. 1962(c), makes it unlawful for any person employed by or associated with an enterprise affecting commerce to conduct the affairs of such enterprise through collection of unlawful debts. The term "unlawful debt" is defined in 18 U.S.C. 1961(6) to include, *inter alia*:

> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof * * * *and* (B) *which was incurred in connection with the business of gambling in violation of the law of* the United States, a *State* or political subdivision thereof * * *. [Emphasis added.]

The "unlawful debts" at issue in this case were alleged to be gambling debts incurred in violation of Texas law. Petitioner argues, however, that although Texas law proscribes various acts of gambling, it does not specifically proscribe the "business of gambling," and therefore the gambling debts in this case were not "unlawful debts" within the meaning of the statutory definition.

Contrary to this contention, the application of Section 1962 is not limited to conduct violating a state statute that proscribes conduct expressly termed the "business of

gambling." As this Court stated, in rejecting a similar argument in *United States* v. *Nardello,* 393 U.S. 286, 293, the "fallacy of this contention" is the assumption that Congress "incorporated state labels for particular offenses." The relevant inquiry is not the manner in which states classify their criminal prohibitions, but whether the particular state involved prohibits the gambling activity charged.

As the court of appeals properly concluded (Pet. App. 12b-14b):

> States making gambling illegal differentiate among levels of gambling activity. First, a state may enact a statute forbidding gambling and may enact a supplementary statute, perhaps with more severe penalties, against extensive gambling activity or against "commercial gambling." Second, a state may have a single statute, and may seek to proceed against extensive gambling activity by charging numerous violations of the same offense. The latter situation prevails in Texas, where no current statute expressly forbids the business of gambling. The particular means a state chooses to deal with the problem of commercial gambling, like the choice between the words "extortion" and "bribery" in *Nardello,* should not control the applicable federal anti-gambling law.
>
> The defendants do not seriously contend that the business of gambling is legal in Texas. If a single act of gambling is illegal, then gambling as a means of livelihood or as an ongoing commercial operation must be illegal as well. The defendants seek to seize upon the state's not classifying gambling as precisely as does the federal statute. But it was not the intent

> of Congress to attack gambling only in states that classify gambling along the federal model. [Footnote omitted.]

Moreover, Texas law does proscribe certain commercialized gambling, as well as single instances of gambling. Section 47.02 of the Texas Penal Code (1974) makes placing a single bet on a game or contest, or on a political election a misdemeanor. Section 47.03, in contrast, proscribes "Gambling Promotion," including the operation of a "gambling place," the receipt of bets or offers to bet, and the sale of chances or of lottery tickets. These activities—which are clearly commercial gambling—are made felonies. The indictment in this case charged that the unlawful debts in question were incurred in violation of Section 47.03.[2] The fact that the state statute did not use the phrase "business of gambling" is irrelevant.

Petitioner erroneously contends (Pet. 21-24), however, that the holding of the court below conflicts with its earlier decisions in *United States* v. *Hawes,* 529 F. 2d 472 (C.A. 5), and *United States* v. *Crockett,* 506 F. 2d 759 (C.A. 5), certiorari denied, 423 U.S. 824, and with decisions in other circuits, *United States* v. *Smaldone,* 485

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[2]The indictment also alleged that the debts in question were incurred in violation of Texas Penal Code, Art. 652a(3) (repealed January 1, 1974), which proscribed the "business of bookmaking." The court of appeals concluded (Pet. App. 13b-14b n. 6) that the federal prosecution could not be based upon the collection of debts incurred in violation of this provision, because under state law these offenses could not be prosecuted after the repeal. However, as the court below recognized, the federal act refers to state law merely to define a generic category of conduct made illegal under federal law. Proof that the defendant violated the state statute is not an element of the federal offense, and a federal prosecution is not barred by limitations on the state's ability to prosecute, such as the running of the state statute of limitations. See *United States* v. *Frumento,* 563 F. 2d 1083, 1087 n. 8A (C.A. 3); *United States* v. *Forsythe,* 560 F. 2d 1127, 1135 (C.A. 3); *United States* v. *Revel,* 493 F. 2d 1 (C.A. 5), certiorari denied, 421 U.S. 909.

F. 2d 1333 (C.A. 10), certiorari denied, 416 U.S. 936, and *United States* v. *Berent*, 523 F. 2d 1360 (C.A. 9). Petitioner cites language from these cases which, he claims, indicates that Congress intended to incorporate state gambling offenses into federal law, not merely to refer to state law for definitional purposes. None of these cases involved the statutory provisions at issue here—Sections 1961 and 1962—instead, each dealt with 18 U.S.C. 1955.[3] But more importantly, none of these cases focused in any way upon the distinction petitioner seeks to draw, and none involved a claim that a federal reference to state law applies only when the state statute uses the exact terminology of the federal act. Accordingly, they in no way conflict with the decision of the court of appeals in the instant case.

3. Petitioner also argues (Pet. 24-28) that the court of appeals' construction of Section 1962(c) was so novel and unexpected that it deprived him of fair warning that his conduct was prohibited. There is no merit to this contention. The terms "gambling business" and "commercial gambling" are phrases of common understanding and that have been held pass constitutional muster. *United States* v. *Hawes, supra,* 529 F. 2d at 478; see also *United States* v. *Crockett, supra,* 506 F. 2d at 762. Furthermore, "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie,* 419 U.S. 544, 550. As the court of appeals emphasized, petitioner cannot seriously contend that he believed that the business of gambling was legal in Texas. The instant case does not involve simply "one act of

[3]Both the instant statute and 18 U.S.C. 1955 were enacted as part of the Organized Crime Control Act of 1970.

gambling" as petitioner suggests (Pet. 26); rather, the indictment alleged that co-defendant Salinas was engaged in the business of gambling for over three years, and that petitioner assisted the collection of numerous gambling debts on many occasions over that period in amounts totalling many thousands of dollars. Accordingly, petitioner had fair notice that he was collecting unlawful debts in violaton of Section 1962(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BENJAMIN R. CIVILETTI,
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